

SINGAPORE REPORTS

Vincent Cheng v Minister for Home Affairs & Ors

HIGH COURT (SINGAPORE) — ORIGINATING MOTION
NO 66 OF 1989
LAI KEW CHAI J
31 JANUARY 1990

Administrative Law — Habeas corpus — Detention under Internal Security Act — Judicial review — Effect of legislation ousting court's jurisdiction to review detention order — Subjective test not applicable — Internal Security Act (Cap 143, 1985 Ed), ss 8(1), 8A & 8B — Republic of Singapore Constitution (Amendment) Act 1989 — Internal Security (Amendment) Act 1989

Constitutional Law — Amendment to the Constitution — Parliament limiting scope of judicial review in ISA cases — Basic features doctrine — Whether applicable — Republic of Singapore Constitution (Amendment) Act 1989 — Internal Security (Amendment) Act 1989

Preventive Detention — Discretionary powers — Satisfaction of President and Minister not reviewable by the courts — Internal Security Act (Cap 143, 1985 Ed), ss 8(1), 8A & 8B — Republic of Singapore Constitution (Amendment) Act 1989 — Internal Security (Amendment) Act 1989

The applicant was detained under the Internal Security Act (Cap 143, 1985 Ed) ('ISA') since 21 May 1987 by reason of his involvement in a Marxist conspiracy to subvert the existing social and political system in Singapore. On 16 June 1989, the President made an order extending his detention till 20 June 1990. In January 1989, Acts No 1 and No 2 of 1989 were passed and came into operation respectively on 27 and 30 January 1989. Act No 1 amended art 149 of the Constitution to provide that any question in respect of proceedings under the ISA be determined in accordance with the provisions of any 'law as may be enacted by Parliament for this purpose' and that 'nothing in Article 93 shall invalidate any law enacted pursuant to this clause'. Act No 2 of 1989 added four new provisions to the ISA which had the effect of:

- (a) pegging the law governing judicial review of any decision made or done by either the President or the Minister under the ISA to that subsisting as at 13 July 1971 (s 8B(1));
- (b) ousting judicial review of any act done or decision made by either the President or the Minister under the provisions of the ISA, except questions relating to compliance with any procedural requirement of the Act (s 8B(2));
- (c) stopping all appeals to the Privy Council in all ISA cases (s 8(C)); and
- (d) making the new provisions applicable retrospectively, ie in respect of proceedings instituted before or after the commencement of the Internal Security (Amendment) Act 1989.

The applicant claims the Minister's decision to detain him under s 8 of the ISA and the decision by the President of 16 June 1989 to extend his detention under s 8(2) of the ISA were illegal, irrational and unconstitutional. In support of this motion, the applicant claimed that he did not act in any manner which was prejudicial to the security of Singapore and that the allegations of fact made against him were not supported by any evidence and were untrue. He also said that his admissions (which he later retracted) were made under duress and that force was used

A against him. Counsel for the applicant argued that in deciding this application, the High Court should apply the objective test, developed in the Court of Appeal decision in *Chng Suan Tze v Minister of Home Affairs & Ors*² to determine the validity of the detention orders made against him.

In respect of the recent amendments to the Constitution, counsel for the applicant argued that:

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- (1) on their true construction, the amendments do not preclude judicial review of decisions and acts purportedly taken or made under the ISA which were in law nullities, and which were not taken or made 'in pursuance' of the power conferred upon the authority by the ISA;
 - (2) art 149 (as amended) did not authorize legislation of that character;
- C
- (3) alternatively, that if art 149 (as amended) did authorize legislation of that character, then the amendments to art 149 were themselves not authorized by the Constitution;
 - (4) if arguments (1), (2) or (3) are correct, then this court can apply the objective test as adumbrated in *Chng Suan Tze*² and judicially review the decision taken in this case and find that:
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- (a) irrelevant considerations were taken into account; and
 - (b) the decisions were irrational in the sense that there was 'no evidence' at all.
- (5) if the law in *Chng Suan Tze*² is applied, the respondents failed to rebut the challenge on the evidence; and
 - (6) if the court rejects arguments (1) to (5), the court can still review the detention to see if it infringes the applicant's rights of religion under art 15 of the Constitution and that the respondents failed to rebut the applicant's challenge on the evidence.
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Held, dismissing the application:

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- (1) As the Constitution has to be worked in less than a perfect world where violence and subversion are not uncommon, it is not possible to provide for fundamental liberties in absolute and unconditional terms. So far as the liberty of the person is concerned, an exception realistically has to be made to ensure the integrity of the Constitution, and indeed, the very existence of a State.
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- (2) The Constitution has conferred special powers to Parliament to legislate against subversion under Part XII of the Constitution. Thus, it was provided from the inception of our Constitution in art 149 that legislation such as the ISA is valid and constitutional notwithstanding its inconsistency with arts 9, 11, 12, 13 or 14 or which would, but for art 149, be outside the legislative power of Parliament.
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- (3) The *Anisminic*⁶ principle is not applicable to this case. It will only apply if there is evidence that the executive authority has acted ultra vires. The Minister, the entire Cabinet and the President had considered a report from the Internal Security Department, the contents of which satisfied them all that it was necessary to detain the applicant. As required, the executive has given the grounds for the detention and the allegations of fact. The Minister and his permanent secretary by their affidavits have claimed the privilege conferred on the executive and have claimed in the national interest the privilege of not disclosing the contents of the report or any other evidence which the ISD has gathered against the applicant.
- I

- (4) There is no justification for the applicant to conclude that there has been no evidence against him. By the scheme of the ISA and of the Constitution from its very inception, the execu-

tive has been entrusted as the sole body to look at and weigh the evidence and case against the person and to form a view on the question whether a detention order should be issued. No case has been made out that there is no evidence against the applicant. It must logically follow that all submissions, each of which is predicated on the absence of any evidence against the applicant, must fall to the ground.

(5) Allegations of 'mala fides', including any allegation that the powers under the ISA had been used for an improper purpose, are not justiciable issues in the context of the ISA.

(6) Sections 8B(1) and 8B(2) of the ISA have effectively excluded any right of judicial review on the grounds of illegality, irrationality and unconstitutionality of any detention order.

(7) The basic features doctrine enunciated in the famous case of *Kesavananda v State of Kerala*,¹⁰ which would have implied a limitation on the legislative powers of Parliament under art 58 to legislate or under art 5 to amend the Constitution is not law in Singapore. In any case, the January 1989 constitutional amendments did not in any way alter the basic structure of the Constitution.

[Editorial Note: The applicant has appealed to the Court of Appeal vide Civil Appeal No 17 of 1990.]

Cases referred to

- 1 *Teo Soh Lung v Minister for Home Affairs and Ors* [1989] 2 MLJ 449 (folld)
- 2 *Chng Suan Tze v Minister of Home Affairs & Ors and other appeals* [1989] 1 MLJ 69 (not folld)
- 3 *Lee Mau Seng v Minister of Home Affairs, Singapore & Anor* [1971] 2 MLJ 137 (folld)
- 4 *Khawaja v Secretary of State for the Home Department* [1984] AC 74 (refd)
- 5 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (folld)
- 6 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (distrd)
- 7 *Endell Thomas v A-G of Trinidad and Tobago* [1982] AC 113 (refd)
- 8 *Greene v Secretary of State for Home Affairs* [1942] AC 284 (folld)
- 9 *R v Home Secretary, ex p Ruddock* [1987] 1 WLR 1482 (folld)
- 10 *Kesavananda v State of Kerala* AIR 1973 SC 1461 (not folld)

Legislation referred to

- Constitution of the Republic of Singapore arts 9(1), 9(6), 12(1), 13, 14(1), 15(1), 149, 151(1), 151(3)
- Constitution of the Republic of Singapore (Amendment) Act 1989
- Internal Security Act (Cap 143, 1985 Ed), ss 8(1), 8(1)(a), 8(2), 8A, 8B, 11(1), 11(2)(b)
- Internal Security (Amendment) Act 1989

Michael Jacob Beloff QC (Patrick Seong and Peter Low with him) for the applicant.

S Tiwari (Soh Tze Bian and Joyce Huen (Ms) with him) for the respondents.

Cur Adv Vult

Lai Kew Chai J: This is an application by Vincent Cheng ('applicant') for a writ of habeas corpus. The applicant has been detained since 21 May 1987 under the Internal Security Act (Cap 143, 1985 Ed) ('ISA'). Pursuant to the

- A powers conferred on the President (acting on the advice of the Cabinet) under s 8(2) of the ISA, which empowers the President to direct that the period of any detention order made under s 8(1) may be extended for a further period or periods not exceeding two years at a time, the President on 16 June 1989 directed that the period of the applicant's detention be extended until 20 June 1990. The application is based on what the applicant claims to be the illegality, the irrationality and the unconstitutionality of the decision of the Minister for Home Affairs of 19 June 1987 to detain him, purportedly under s 8 of the ISA and of the decision of the President of 16 June 1989 to extend his detention order, purportedly pursuant to s 8(2) of the ISA.

- The arguments raised before me are essentially directed against first, the legal effectiveness and, secondly, against the constitutional validity of the recent amendments, to which detailed reference must unavoidably be made, so far as judicial review of ISA cases is concerned. These arguments are in several material respects similar to those raised in the High Court in a companion habeas corpus application in *Teo Soh Lung v Minister for Home Affairs and Ors*¹ where Chua J, in a careful judgment delivered on 25 April 1989, rejected the arguments and dismissed the motion. I am exercising co-ordinate jurisdiction with Chua J in this matter and unless I am persuaded according to well-established principles to depart from the approach of Chua J, and unless I am persuaded in effect to rule that the detention is ultra vires the ISA by applying the objective test, quite apart from the validity or otherwise of the constitutional amendments by Act No 1 of 1989 and the effectiveness or otherwise of the amendments of the ISA by Act No 2 of 1989, which came into operation respectively on 27 and 30 January 1989, the application before me must fail.

- The facts may be briefly summarized for present purposes as follows. On 21 May 1987, the applicant was arrested under the ISA. Five days later, the Ministry of Home Affairs issued a detailed press release which stated, inter alia, that 'the Internal Security Department has uncovered a Marxist conspiracy to subvert the existing social and political system in Singapore through communist united front tactics to establish a communist state'. One Tan Wah Piow was named as the mastermind whose principal subordinate in Singapore was the applicant. The ministry issued further press releases on 27, 28 and 29 May 1987. On 19 June 1987, the applicant was served with an order of detention under s 8(1)(a) of the ISA for a period of two years with effect from 20 June 1987. As stated earlier, that detention order has been extended by the President to 20 June 1990.

The grounds for the detention were set out as follows:

Since 1981 you acted in a manner prejudicial to the security of Singapore by being the central figure in the Marxist

conspiracy masterminded by Tan Wah Piow, to subvert the existing social and political system in Singapore, using communist united front tactics with a view to establishing a Marxist state.

The allegations of fact which the Minister for Home Affairs furnished the applicant pursuant to s 11(2)(b) of the ISA were as follows:

- 1 That, since your meeting with Tan Wah Piow in March 1981 in London, you carried out Tan Wah Piow's instructions to build up a mass-based united front of grassroots organizations in Singapore to oppose the government, by violent means, if necessary.
- 2 That, since October 1981, in furtherance of Tan Wah Piow's objective, you indoctrinated student and Catholic activists in Singapore with Marxist ideas, with a view to recruiting them into the Marxist network.
- 3 That, in January 1986, you formed the Coalition of Organizations for Religion and Development ('CORD') in Singapore to exert influence and control over Catholic organizations and their leaders so that they could become a political pressure group and part of a united front to subvert the existing social and political system.
- 4 That in November 1986, you were involved, together with some Catholic priests and activists, in forming an 'ad hoc group', in Singapore, which you intended to use to further the Marxist conspiracy.
- 5 That, under the aegis of the Justice and Peace Commission ('JPC'), Singapore, you manipulated JPC to disseminate leftist and anti-establishment ideas to subvert the Catholic church.

The Minister for Home Affairs, in his affidavit filed in these proceedings, stated that prior to the issue of the detention order in respect of the applicant, the Cabinet considered the report of the Internal Security Department ('ISD'). The report was made by persons in the ISD who were experienced in investigating matters of the kind in hand and who were under a duty to report on the same to the government. As the Cabinet was satisfied that since 1981 the applicant had acted in a manner prejudicial to the security of Singapore, and with a view to preventing him from acting in any manner prejudicial to the security of Singapore, the Cabinet resolved that the order of detention should be made. The Cabinet therefore tendered its advice to the President of Singapore. The ISD report was also submitted to the President. The President was satisfied that an order of detention be made against the applicant. After the President's satisfaction was conveyed to the Minister, the Minister made the order of detention dated 19 June 1987.

The applicant, though informed of his rights, did not make any representations to the advisory board pursuant to s 11(1) of the ISA. On 26 May 1988, the applicant was informed that he could appear before the advisory board on 9 June 1988 concerning the review of the order of detention relating to him. On 9 June 1988, the advisory board reviewed his detention in accordance with s 14 of

A the ISA. The applicant was present and was represented by his lawyer. The advisory board submitted a written report to the Minister on 10 June 1988. The board reported that the applicant's continued detention was justified.

B On 8 April 1989, the applicant was informed that he could appear before the advisory board on 22 April 1989 concerning the review of the order of detention relating to him. On 22 April 1989, the board reviewed his detention according to s 13 of the ISA. He was present at the review and was represented by another lawyer. In its report dated 24 April 1989 to the Minister, the board recommended C that the detention of the applicant be extended for another year. On or about 31 May 1989, the President, acting in accordance with the advice of the Cabinet, being satisfied that it was necessary to continue the detention of the applicant with a view to preventing him from acting in any manner prejudicial to the security of Singapore, decided D that the detention of the applicant be extended for a further period of one year with effect from 20 June 1989. A copy of the direction which extended the order of detention was duly served on the applicant.

E In support of his motion, the applicant in his first affidavit denied that he had acted in any manner prejudicial to the security of Singapore. He claimed that the allegations of fact made against him were not supported by any evidence and were untrue. By para 18 of his affidavit, he said he was 'retracting' his statements made to the ISD; he claimed that his admissions that he was a Marxist and F that there was a network were made under duress and that force was used against him. He protested his innocence and claimed that all his activities were motivated by his Christian faith and they were in response to the call of Vatican Council II. He claimed that arts 9(1), 12(1), 14(1) and 15(1) of the Constitution of the Republic of Singapore ('the Constitution') had been infringed. G

H In their affidavits filed on behalf of the respondents, the Permanent Secretary, Ministry of Home Affairs, and several officers of the ISD denied that the applicant was subjected to any use of force, assault, battery, duress, coercion or intimidation. In his affidavit, the case officer of the ISD assigned to the applicant's case further stated I that the applicant was informed that he would be released when he was rehabilitated and no longer posed a security threat. Contrary to what was alleged by the applicant in his affidavit, this ISD officer stated that the applicant was subjected to a systematic and reasonable programme of rehabilitation. He said he and other senior ISD officers regularly held discussions with the applicant with a view to his rehabilitation. As part of the rehabilitation programme, the applicant had also been allowed to see the prison chaplain weekly and had met six Catholic priests and a Catholic leader from time to time during his detention.

The Permanent Secretary, Ministry for Home Affairs, in his affidavit stated that the government only decided to act after careful deliberation. In its statement of 20 April 1988, the ministry stated:

ISD had monitored the principal persons, Tan Wah Piow and Vincent Cheng, since the early 1970s. In June 1986, ISD had apprised the government of the activities of Vincent Cheng and a group of radicals operating under the cover of the Catholic Church. The government took a serious view of such undesirable activities.

The Prime Minister registered his concern when the Pope was in Singapore.

On 9 July 1986, the Minister for Home Affairs warned the Archbishop, Monsignor Gregory Yong, about the problem. Despite this, Vincent Cheng and the others continued with their radical activities. Therefore, when the Pope visited Singapore on 20 November 1986, the Prime Minister took it upon himself to register his concern with the Pope in the presence of Archbishop Yong.

The government only decided to launch the May 1987 operation after careful deliberation. I could have allowed the Marxist conspiracy to fester and grow, in order to watch where it would lead, but decided it would be safer to nip the conspiracy in the bud.

The Permanent Secretary, Ministry for Home Affairs, further stated that the care with which the matter was dealt with could be seen from the speech of the First Deputy Prime Minister and the Minister for Defence made in Parliament on 29 July 1987. The relevant portion of the First Deputy Prime Minister's speech is set out below:

When ISD recommended the detention of Vincent Cheng and the others, we did not just take their word for it. We asked many questions. We wanted to be very sure that the conspiratorial activities of the 16 were indeed prejudicial to the security of Singapore. This is the first time that the younger Ministers have to take a tough decision. This is the first time that we have to use the ISA to deal with a security threat. It is a big decision and because it is a big decision I asked the Minister for Home Affairs to discuss the subject with our other younger colleagues. So all members of the younger leadership were involved in deliberating this case. Each one of us gave our view as to what we should do with the 16 who have been discovered by the ISD for plotting, on a long-term basis, to subvert the stability of Singapore. All of us were satisfied that the 16 were indeed involved in some nefarious activities, as reported by the ISD.

Both the Minister for Home Affairs and his Permanent Secretary, in their affidavits, dealt with the question of the disclosure of the ISD report and the evidence. They both asserted that any disclosure would be against the national interest as it would lead to the discovery of the identities of source and informers, the methodology and the actual extent of information known to the ISD. They further pointed out that such disclosure would pose a danger and disincentive to sources and informers and that the baring of the methodology and actual extent of information known to the ISD would threaten the efficiency and effectiveness of the security operations of the department.

A I should now turn to the law of preventive detention in Singapore and the amendments to the Constitution and the ISA promulgated in Parliament in January 1989. The Constitution is the supreme law of the land and any law enacted by Parliament after the commencement of the Constitution which is inconsistent with it shall, to the extent of the inconsistency, be void: see art 4. There is set out in Part IV of the Constitution a number of fundamental liberties which provide for the liberty of the person (see art 9), equality (see art 12), freedom of movement (see art 13), speech, assembly and association (see art 14) and religion (see art 15). As the Constitution has to be worked in less than a perfect world where violence and subversion are not uncommon, it is not possible to provide for such fundamental liberties in absolute and unconditional terms. So far as the liberty of the person is concerned, an exception realistically has to be made to ensure the integrity of the Constitution and, indeed, the very existence of a State. Accordingly, by art 9(6) of the Constitution, it has been provided that nothing in art 9 shall invalidate any law which authorizes the arrest and detention of any person in the interests of public safety, peace and good order. That Parliament has to be conferred by the Constitution special powers to legislate against subversion has been and is specifically underlined by the Constitutional provisions as set out in Part XII of the Constitution. Thus, it was provided from the inception of our Constitution in art 149 of the Constitution that legislation such as the ISA is valid and constitutional notwithstanding that it is inconsistent with arts 9, 11, 12, 13 or 14 or which would, but for art 149, be outside the legislative power of Parliament.

F There are, however, some important constitutional restrictions on any law which allows preventive detention without trial. By art 151(1), it is constitutionally provided that the authority on whose order any person is detained under such a law shall as soon as may be, inform him of the grounds for his detention and, subject to an important proviso which I shall presently come to, the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be. The important proviso I referred to earlier is set out in art 151(3) which provides that art 151 does not require any authority to disclose facts, the disclosure of which would, in its opinion, be against the national interest. Before I part with art 151 of the Constitution, it bears reminder that this article requires a detainee to be informed of (a) the grounds for his detention; and (b) the allegations of fact on which the detention order is based. G The article does not in terms require that evidence admissible only in a court of law and which evidentially substantiate the allegations of fact should be produced. It does not require evidence from witnesses to be produced nor the production of any written confessions, documentary or other evidence. Indeed, the framers of the Constitution recognized that disclosure of any fact may harm the na-

tional interest and has written in the proviso referred to earlier.

The ISA confers on the Minister for Home Affairs powers of preventive detention. By s 8(1) therein, it is provided that if the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore, it is necessary to do so, the Minister shall make an order directing that such person be detained for any period not exceeding two years. In *Chng Suan Tze v Minister of Home Affairs & Ors and other appeals*,² the Court of Appeal ruled that evidence of the President's satisfaction must be such evidence as would be admissible at a trial which may be given by the President, or by the Cabinet Secretary or an authorized Minister where there is evidence that the Cabinet or the authorized Minister was satisfied and that the President after receiving the advice of the Cabinet or the authorized Minister was also satisfied. In the instant case, the Minister for Home Affairs has given such evidence in his affidavit and no issue arises in this regard.

By s 8(2), the President may direct that the period of any detention order made under s 8(1) be extended for a further period or periods not exceeding two years at a time.

The legislative scheme set out in the provisions of the ISA does not provide that a detention order can only be made after a trial in the usual way in a court of law where only admissible evidence would and has to be tendered. Nor is it envisaged that the judiciary would exercise any appellate jurisdiction in reviewing any evidence or determine if any allegation against any detainee is borne out by evidence tendered by the detaining authority and admitted in accordance with the law of evidence.

In the light of the constitutional and legislative scheme which I have set out in relation to the law of preventive detention, I should now refer to two cases before I turn to the amendments of January 1989. The first case is *Lee Mau Seng v Minister of Home Affairs, Singapore & Anor*.³ It is important to note for present purposes that the decision of the High Court was given on 13 July 1971. An order of detention was made against Lee Mau Seng by the Minister for Home Affairs under s 8(1) of the ISA. In his application for a writ of habeas corpus, Lee Mau Seng challenged the order of detention, inter alia, on the bases that (a) the grounds on which the order was made and the allegations of fact on which the order was based were vague, inadequate and irrelevant; and (b) the order of detention was made in bad faith. It was there held that the sufficiency and relevancy of the consideration upon which the executive detained the applicant under s 8(1) of the ISA were matters for the subjective satisfaction of the President acting on the advice of the Cabinet or of the Minister. That has been described as 'the subjective test'.

A It was also held that 'mala fides', which included allegations that the powers of detention were there used for improper purposes is not a justiciable issue in the context of the scheme for preventive detention.

B The second case is *Chng Suan Tze*.² The Court of Appeal in this case, on 8 December 1988, allowed the appeals on the ground that there was no sufficient evidence of the President's satisfaction as required under s 8(1) of the ISA. In the appeal, it was argued that the subjective test pronounced in *Lee Mau Seng*³ was no longer good law. Although the Court of Appeal did not adjudicate upon his question, its conclusion was summarized in the following terms:

C The President's satisfaction under s 8 of the ISA and the Minister's satisfaction under s 10 of the ISA are both reviewable by a court of law as:

(a) the subjective test adopted in *Karam Singh* [1969] 2 MLJ 129 and its progeny can no longer be supported and the objective test is applicable upon a judicial review of the exercise of these discretions; ...

D A scrutiny of the decision of the Court of Appeal shows that the Court of Appeal had opined albeit obiter dicta, that a court of law could examine whether the executive's decision was in fact based on national security considerations and whether the matters relied on by the executive fall within the scope of any of the purposes specified in s 8(1) of the ISA. Further, in opining that the executive discretion conferred by s 8(1) of the ISA was not conditioned upon the existence of any jurisdictional or precedent fact which the executive had to prove, such as that dealt with in *Khawaja v Home Secretary*,⁴ the Court of Appeal nevertheless concluded that the scope of judicial review of the exercise of the discretion under s 8(1) of the ISA could be undertaken on the now familiar *GCHQ* [*Council of Civil Service Unions v Minister for the Civil Service*]⁵ grounds of illegality, irrationality or procedural impropriety. This view of the scope of judicial review would have entailed in habeas corpus proceedings, the production of evidence, either by way of affidavits or, not inconceivably where there are controversial issues of fact, in the examination of oral evidence in court, subject always to the plea of constitutional or statutory privilege to which I have referred.

H The obiter dicta of the Court of Appeal were followed very swiftly by the January 1989 amendments. By Act No 1 of 1989, art 149 of the Constitution was amended. The article as amended provides as follows (the amendments are in italic prints):

I (1) If an Act recites that action has been taken or threatened by any substantial body of persons, whether ... inside or outside Singapore —

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

(b) to excite disaffection against the President or the Government;

- (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence;
- (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
- (e) which is prejudicial to the security of Singapore,

any provision of that law designed to stop or prevent that action or any amendment to that law or any provision in any law enacted under the provisions of clause (3) is valid notwithstanding that it is inconsistent with Articles 9, 11, 12, 13 or 14, or would, apart from this Article, be outside the legislative power of Parliament.

(2) A law containing such a recital as is mentioned in clause (1) shall, if not sooner repealed, cease to have effect if a resolution is passed by Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under the Article.

(3) *If, in respect of any proceedings whether instituted before or after the commencement of this clause, any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any law referred to in this Article, such question shall be determined in accordance with the provisions of any ... law as may be enacted by Parliament for this purpose; and nothing in Article 93 shall invalidate any law enacted pursuant to this clause.*

By Act No 2 of 1989, the ISA was amended by the addition of four new provisions: ss 8A, 8B, 8C and 8D as follows:

8A In this Part, 'judicial review' includes proceedings instituted by way of ...

- (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
- (b) an application for a declaration of an injunction;
- (c) any writ of habeas corpus; and
- (d) any other suit or action relating to or arising out of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any provision of this Act.

8B(1) Subject to the provisions of subsection (2), the law governing the judicial review of any decision made or act done in pursuance of any power conferred upon the President or the Minister by the provisions of this Act shall be the same as was applicable and declared in Singapore on the 13th day of July 1971; and no part of the law before, on or after that date of any other country in the Commonwealth relating to judicial review shall apply.

(2) There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any question ... relating to compliance with any procedural requirement of this Act governing such act or decision.

8C Notwithstanding the provisions of any other written law, no appeal shall lie in the Judicial Committee of Her Britannic Majesty's Privy Council in any proceedings instituted by way of judicial review in respect of any decision made or act done under this Act or in respect of any question of interpretation of the provisions of Part XII of the Constitution or any law made thereunder.

8D Sections 8A, 8B and 8C shall apply to any proceedings instituted by way of judicial review of any decision made or

act done under the provisions of this Act, whether such proceedings have been instituted before or after the commencement of the Internal Security (Amendment) Act 1989.

I should now deal with the submissions made on behalf of the applicant. Six submissions were made. First, it was submitted that on their true construction the amendments of the ISA do not preclude judicial review of decisions and acts purportedly taken or made under the ISA, which were in law nullities, and which were not taken or made 'in pursuance' of the power conferred upon the authority by the ISA. The second submission is an argument consequential upon this court's acceptance of the applicant's first submission and it is this. If on a true construction of the amendments they have the effect as urged by the applicant, then it was argued art 149 (as amended) did not authorize legislation of that character. The third submission is an alternative of the second submission. Mr Beloff submitted that, on their true construction, if art 149 (as amended) did authorize legislation of that character, then the amendments to art 149 were themselves not authorized by the Constitution. Fourthly, Mr Beloff submitted that if any of the first three submissions were correct, then the state of the law in Singapore is as enunciated by the Court of Appeal in *Chng Suan Tze's* case² and it must ineluctably follow that this court can judicially review the decisions taken in this case and find that (a) irrelevant considerations were taken into account; and (b) the decisions were irrational in the sense that there was 'no evidence' at all. Fifthly, it was submitted that if what had been adumbrated in *Chng Suan Tze*² is the law, then the respondents had failed to rebut the challenge on the evidence. The sixth and last submission is that if all five submissions were rejected, this court can still review the detention to see if it infringes the applicant's rights of religion under art 15 of the Constitution and that the respondents had failed to rebut the applicant's challenge on the evidence.

In relation to the first submission, it was repeatedly stressed that the challenge is not directed against the merits of any decision taken or act done within jurisdiction; the challenge is against any decision taken or act done for purposes not authorized by the ISA and were therefore nullities. Mr Beloff said that the amendments to the ISA had precluded any judicial review of any decision or act taken or done within jurisdiction, whatever are the merits, but he pointed out that the amendments did not exclude review of any decision or act taken or done outside and beyond the jurisdiction conferred by the ISA. He rhetorically asked whether a red-haired person could be arbitrarily arrested under the ISA, which, of course, is an absurd suggestion because how is the executive to state the grounds and the allegations of fact? In referring to the kind of *mala fides* referred to in *Lee Mau Seng*,³ which the High Court held was not justiciable, he said that *mala fides* was used in a special sense. He said it was unacceptable that the law

could judge proof of any executive action or decision which is deliberately taken for an improper purpose or on purely personal grounds. He then referred to the case of *Anisminic Ltd v Foreign Compensation Commission*⁶ and claimed that the errors committed by the executive in this case was of the kind which was described by Lord Reid at p 171B-E, and which went to the jurisdiction conferred on the executive by the ISA. It was observed that *Anisminic*⁶ was decided before 13 July 1971 and that the ouster clause in that case, which he contended was materially similar to s 8B(2), was ineffective in excluding judicial review on the simple premise that Parliament could not have intended that the Foreign Compensation Commission could act outside its legislation mandate. Reference was also made to *Endell Thomas v A-G of Trinidad and Tobago*⁷ where the Privy Council dealt with an ouster clause in a Constitution and approved the *Anisminic*⁶ principle. It is plain that this principle, where it applies, is quite incontrovertible. A court of law must be able to see where a tribunal or an executive authority has exceeded its constitutional or legislative mandate, which Parliament itself would have contemplated or condoned, and order the appropriate relief.

In my judgment, the *Anisminic*⁶ principle has no application to the salient facts of this case. It will only apply if there is evidence that the executive authority has exceeded its mandate or has misdirected itself on the law. It will therefore only apply if there is evidence that an executive authority has acted ultra vires. The salient facts in this case are as follows. The Minister, the entire Cabinet and the President had considered a report from the ISD, the contents of which satisfied them all that it was necessary to detain the applicant. As required, the executive has given the grounds for the detention and the allegations of fact. The applicant had admitted that he was a Marxist, that he was a member of the conspiracy, and, if I am not wrong, he even admitted in a television interview that if necessary he would have resorted to violence to bring about a Communist state. True, he has now by his affidavits recanted; he claims that he had nothing to do with any conspiracy and that he was practising his religious faith.

The Minister and his Permanent Secretary, by their affidavits, have claimed the privilege conferred on the executive and have claimed in the national interest the privilege of not disclosing the contents of the report or any other evidence which the ISD has gathered against the applicant. It is for the executive to consider the evidence and form a view in regard to the interest of the security of the state. In these circumstances, I can see no justification for the applicant in this case to jump to the conclusion that there has been no evidence. By the scheme of the ISA and of the Constitution from its very inception, the executive has been entrusted as the sole body to look at and weigh the evidence and case against a person and to form a view

A on the question whether a detention order should be issued.

B It will readily be seen that all six submissions made on behalf of the applicant make the assumption that there has been no evidence against the applicant. That assumption has to be proved. In truth and in fact the case against him has been considered by the entire Cabinet and, in the light of his own confessions, though since withdrawn, the least that can be asserted against the applicant is that there has been some evidence against the applicant which related to national security and that once that assertion can be properly made it would be contrary to the scheme and the law of preventive detention for any court of law to adjudicate on the sufficiency or relevancy of the evidence nor should a court, by a side wind, as it were, investigate any allegation of bad faith or the abuse of the powers of ISA. This part of the law was spelt out by the learned Chief Justice in on 13 July 1971 and I entirely agree with the decision of Chua J that the intention of Parliament in enacting s 8B(1) of the ISA is to affirm the law laid down in *Lee Mau Seng*.³

E The approach I take of this matter, in my view, is exactly that taken by the learned judges in *Greene v Secretary of State for Home Affairs*,⁸ in *GCHQ*⁵ and *R v Home Secretary, ex p Ruddock*.⁹ For the avoidance of doubt, I would repeat that it is not and never has been my view that in the last-mentioned case, Taylor J (as he then was) had merely accepted the assertions of the Minister as though it was a plea in bar. I took a realist's view of the case and observed that in all three cases it merely required F affidavit opinions of the Ministers concerned to satisfy the judiciary that considerations of national security had operated.

G In view of my decision that no case has been made out that there is no evidence against the applicant, it must logically follow that all six submissions of the applicant, each of which is predicated on the absence of any evidence against the applicant, must fall to the ground. Not all the issues raised in *Teo Soh Lung*¹ and fully considered by Chua J are relevant in this case. So far as his views are relevant in this case, I respectfully adopt them as though they are set out in seriatim and specifically concurred; this concurrence is, of course, on the basis that I am wrong on the view I take of the evidence.

I Before I part with this judgment, I should set out concisely the propositions of law which had been stated by Chua J with which I would respectfully concur. First, the High Court on 13 July 1971 declared in *Lee Mau Seng*³ that allegations of 'mala fides', including any allegation that the powers under the ISA had been used for an improper purpose, are not justiciable issues in the context of the ISA. Secondly, ss 8B(1) and 8B(2) of the ISA have effectively excluded any right of judicial review on the grounds of illegality, irrationality and unconstitutionality of any

detention order. Thirdly, the well-known *Kesavananda*¹⁰ doctrine enunciated by the Supreme Court of India, which would have implied a limitation on the legislative powers of Parliament under art 58 to legislate or under art 5 to amend if the legislation or amendment would alter the basic structure of the Constitution, is not the law in Singapore. Fourthly, in any case, the January 1989 constitutional amendments did not in any way alter the basic structure of the Constitution. The motion is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Seong Tang & Partners; Low Yeap & Co.*

Reported by *Kevin Tan Yew Lee*

Wong Kok Chin v Singapore Society of Accountants

HIGH COURT (SINGAPORE) — DISTRICT COURT APPEAL
NO 3 OF 1988
YONG PUNG HOW J
7 DECEMBER 1989

Professions — Disciplinary proceedings — Standard of proof for disciplinary proceedings — Duty of disciplinary committee — Charges concerning 'grave impropriety', 'gross neglect', and 'discreditable act' — Accountants Act (Cap 212, 1970 Ed), s 34(1)(b), (7) & 35(2) — Accountants Act (Cap 2, 1985 Ed), ss 21 & 33 — Accountants Act 1987, s 21 — Companies Act (Cap 50, 1985 Ed), s 207

Administrative Law — Disciplinary tribunals — Natural justice — Charges against accountant — Charge relating to knowledge of accused — Defective as no date specified — Whether tribunal entitled to conduct inquiry by examining witnesses

Companies and Corporations — Auditor — When appointed as such — Duties of auditor — Conflict of interest in acting as financial consultant for audited client — Share allotted for cash — Whether cash actually had to be paid — Standard of conduct expected from auditor — Importance of professional standards — Hindsight not to be considered in assessing conduct

Words and phrases — 'Grave impropriety' — Accountants Act (Cap 212, 1970 Ed), s 34(1)(b)

Words and Phrases — 'Gross neglect' — Accountants Act (Cap 212, 1970 Ed), s 34(1)(b)

Words and Phrases — 'Discreditable act' — Accountants Act (Cap 212, 1970 Ed), s 34(1)(b)

The appellant is a public accountant registered under the provisions of the Accountants Acts. He was practising in partnership under the firm name of Wong & Teo, David Teo and Associates ('the firm'). The firm had two other partners. Although a resolution had been recorded for the first directors' meeting of Broadview Commodities, appointing the firm as the auditors of

A the company, nothing more appears to have been done to confirm or activate this relationship until the accounts of Broadview Commodities for the first year of operations were completed in 1982. In August 1982, the firm accepted the appointment as auditors by a letter dated 23 August 1982 and then carried out the first annual audit of Broadview Commodities. Government authorities investigated Broadview Commodities, and the investigations resulted in prosecutions against two Broadview Commodities officers. Arising out of the investigations of Broadview Commodities, a letter of complaint was sent by the Commercial Crime Division of the Criminal Investigation Department to the Singapore Society of Accountants ('the society'). It summarized the investigations into Broadview Commodities and referred to what it described as the 'deep involvement' of the appellant with Broadview Commodities. It finally expressed the view that in his involvement, he 'had failed to take reasonable care and skill', and 'could not have maintained a position of independence required of an auditor in order to be objective in forming and expressing his opinion on the accounts of Broadview Commodities'. The complaint was laid before the society's investigation committee, which in turn referred it to the disciplinary committee, which then held an inquiry.

D Before the disciplinary committee ('the committee'), the appellant faced seven charges under s 34(1)(b) of the Accountants Act (Cap 212, 1970 Ed) (later renumbered s 33(1)(b) of the Accountants Act (Cap 2, 1985 Ed)) ('the Act'), all of which were alleged to amount to 'grave impropriety', 'gross neglect', and 'an act discreditable to an accountant'. On two charges, he was ordered to be removed from the Register of Accountants; on three charges, he was suspended for a period of one, three and five years respectively while no order was made as regards two charges. The suspensions imposed were to run concurrently. The appellant appealed to the High Court against these orders of the committee.

F Held, allowing the appellant's appeal on all the charges:

(1) The terms 'grave impropriety', 'gross neglect', and 'discreditable act' are not defined in the Act and there has also been no judicial interpretation of these terms. Neither has the society issued for the benefit of its members any rules or guidelines as to what acts of default or misconduct would be considered by the society to fall within the scope of this section. The court must therefore determine for itself what acts or omissions amounted to professional misconduct which fell within the range of offences set out in the section, and whether, on a review of the evidence, the appellant was guilty of any of them. An act or default which was discreditable to an accountant need not necessarily have arisen out of his professional work as an accountant, but it should nevertheless have been an act which would have brought discredit on him as an accountant or on the profession as a whole.

(2) A practical test could have been if reasonable people, on hearing about what he had done, would have said without hesitation that as an accountant he should not have done it. The court was of the opinion that a member of the society would have been guilty of gross neglect in the performance of his professional duties if, having regard to all the surrounding circumstances at the time, he did not exercise the skill and care that a reasonable client would have been entitled to expect of him.

(3) For any member of the society to be guilty of grave impropriety in a professional respect under s 34, there must have been the same element of moral turpitude in the misconduct complained of, to the extent that it would have been regarded without hesitation by other accountants as being so disgraceful